

## STANDARDS OF CONDUCT FOR AIR FORCE MEDIATORS

*Preface: The following seven Standards of Conduct for Air Force Mediators have been adapted by the Air Force Office of General Counsel, Dispute Resolution Division (SAF/GCD) from the Model Standards of Conduct for Mediators developed jointly by the Dispute Resolution Section of the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution (SPIDR)(now part of the Association for Conflict Resolution). With the publication of AFI 51-1201, Alternative Dispute Resolution in Workplace Disputes, these standards become mandatory for Air Force mediators and other neutrals in Air Force workplace disputes, including EEO complaints (formal and informal), employee grievances under both negotiated and agency procedures, Unfair Labor Practice disputes, and MSPB appeals. Following each standard is commentary to explain the standard and provide illustrations of its application. Unlike the standards, the comments are not mandatory, but are intended merely as guidance to assist neutrals in applying the standards to particular factual situations. SAF/GCD gratefully acknowledges the work of the U.S. Postal Service 'REDRESS' program, from which much of the commentary has been adapted.*

### Standard 1: Consent.

A mediator shall make reasonable efforts to ensure that all parties understand the mediation process and the options available to them, and that the parties are free and able to make whatever choices they desire regarding participation in mediation generally, or regarding specific settlement options.

#### *Comments:*

- *The mediator is obligated to explain the mediation process to the parties, including the mediator's role and function, and to inform the parties of their right to refuse any offer of settlement and to withdraw from mediation at any time and for any reason. This obligation continues throughout the mediation.*
- *The mediator must avoid exerting undue pressure on any party to participate in mediation or to accept a settlement. The mediator may, however, encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.*
- *Where a party appears to be acting under coercion, intimidation, or fear, or without capacity to comprehend the process, the mediator must explore the circumstances with the party and, unless the party objects, discontinue the mediation. If the party insists on continuing, the mediator must do so, but should continue to raise the question and check for willingness to proceed.*

### Standard 2: Self-Determination.

A mediator shall respect and encourage self-determination by the parties in their decision to resolve their dispute, and on what terms, and shall refrain from being directive or judgmental regarding the issues in dispute and options for settlement.

*Comments:*

- *The mediator must leave to the parties full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may and should assist the parties in making informed and thoughtful decisions, but should never substitute his or her personal judgment for that of the parties.*
- *The mediator may raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility of proposed options for settlement, including their impact on affected third parties. The mediator may also make neutral suggestions for the parties' consideration, but at no time is the mediator allowed to make decisions for the parties, or directly express his or her opinion about or advise for or against any proposal under consideration.*
- *If, in the mediator's informed judgment, an agreement desired by the parties could not be enforced because of illegality, unconscionability, or any other reason, the mediator is obligated to so inform the parties. If the parties insist on that agreement, the mediator should discontinue the mediation, but may not violate the obligation of confidentiality.*

**Standard 3: Separation of Mediation from Counseling and Legal Advice.**

Mediators shall limit themselves solely to the role of mediator, and shall refrain from giving legal or therapeutic information or advice, and from otherwise engaging in counseling or advocacy during mediation.

*Comments:*

- *The mediator may, in areas where he or she is qualified by professional training and experience, raise questions regarding the information presented by the parties in the mediation session, including information about the law.*
- *Even in areas where the mediator is qualified by professional training and experience, the mediator is never allowed to offer professional advice (including, but not limited to, financial or legal advice, counseling, or therapy) to the parties or express a professional or personal opinion on an issue or option for settlement.*
- *When a mediator believes a party is acting without adequate information or advice on legal or psychological aspects of the issues presented, the mediator must raise the option of obtaining independent expert advice prior to resolving the issues and must afford the parties the opportunity to do so.*
- *The mediator must limit his or her role to that of mediator, and must never assume the role of advocate for either party's interests or provide counseling or therapy to either party during the mediation process.*

**Standard 4: Impartiality.**

A mediator shall maintain impartiality and evenhandedness toward the parties and the issues in dispute. Where the mediator's impartiality is in question, the mediator shall decline to mediate or shall withdraw from the mediation.

*Comments:*

- *The concept of impartiality is central to the mediation as it directly affects the mediator's ability to facilitate a fair and even-handed process.*
- *Impartiality means an absence of favoritism or bias—e.g., expressed sympathy or antipathy—toward any party or position taken by a party to mediation. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.*
- *To ensure not only the fact but the appearance of impartiality, the mediator is obligated to disclose to the parties, at the earliest moment, any conflicts of interest, or any present or prior relationship, personal or professional, between the mediator and any party or party representative.*
- *The mediator is obligated to decline to serve (or, if the case has begun, to withdraw) as the mediator if:*
  - *As a result of the disclosure of a prior relationship, any party or representative objects to the mediator's serving;*
  - *The mediator's own judgment is that a relationship with a party or representative will compromise impartiality, or appear to do so, even after full disclosure; or*
  - *The mediator or any party believes that, apart from relationships, the fact or appearance of impartiality is compromised either by the mediator's personal reaction to any party (or party position) or by the mediator's background or experience.*
- *The mediator should make every effort not to show partiality or prejudice based on a party's behavior, appearance, or actions at the mediation.*
- *The mediator should exercise discretion and due regard for the appearance of impartiality in establishing new relationships with parties to past mediations.*

**Standard 5: Conflicts of Interest.**

A mediator shall, as far as possible, avoid conflicts of interest and, in any event, shall resolve such conflicts in favor of the mediator's primary obligation to impartially serve the parties to the dispute.

*Comments:*

- *A mediator who is a lawyer must not advise or represent either of the parties in future proceedings concerning the subject matter of the dispute, and a mediator who is a therapist must not provide future therapy to either of the parties or both of them regarding the subject matter of the dispute.*
- *A mediator must not review for regulatory or legal compliance a settlement agreement resulting from a dispute in which he or she was the mediator.*
- *Under EEOC guidance in MD-110, an EEO Investigator or Counselor may not serve as a mediator in an EEO case he or she has investigated or counseled the complainant.*

*Conversely, an EEO Counselor who serves as a mediator in an EEO case should not thereafter, should mediation fail, serve as a counselor or investigator in the same case.*

- *The mediator must disclose to the parties all actual and potential conflicts of interest and obtain the consent of the parties before proceeding with the mediation. If, despite full disclosure and acceptance by the parties, the existence of a conflict calls into question a mediator's impartiality, the mediator shall decline to mediate or shall withdraw from mediation.*

### **Standard 6: Confidentiality.**

A mediator shall maintain confidentiality of the mediation process and communications made in connection with the process, to the extent necessary to comply with the law and the reasonable expectations of the parties.

#### *Comments:*

- *Apart from statutory or other legal duties to report certain kinds of information, a mediator is not obligated to disclose to a nonparty, directly or indirectly, any information communicated to the mediator by a party during the mediation process.*
- *In communicating with the Air Force or any of its agents, officers or employees who did not participate as a party or party representative in the mediation, the mediator may disclose only whether or not a settlement was reached.*
- *Absent statutory or other legal duties, a mediator must not disclose, directly or indirectly, to any party to a mediation, information communicated to the mediator in confidence by another party unless that party expressly gives permission to do so.*
- *Where confidential information from one party might, if known to the other party, change the second party's decision about whether to accept or reject certain terms of a settlement, the mediator may encourage the first party to permit disclosure of the information to the second party, but absent such permission, the mediator may not disclose it.*
- *A mediator cannot ensure the confidentiality of statements parties make to each other, or of any memoranda, documents, or other tangible evidence shared between the parties during the mediation.*

### **Standard 6: Integrity of the Process.**

A mediator shall conduct the mediation in a fair and diligent manner. The mediator shall protect the integrity of the mediation process by encouraging mutual respect between the parties and by taking reasonable steps, subject to the principle of self-determination, to limit abuse of the process, including discontinuing the mediation if necessary.

#### *Comments:*

- *The mediator is obligated to make reasonable efforts not only to promote full dialogue and prevent manipulation or intimidation by either party, but also to promote each*

*party's understanding and respect for the concerns and positions of the other, even if they cannot agree.*

- *Where the mediator discovers an intentional abuse of the process, such as deliberate nondisclosure or falsification of vital information, the mediator is obligated to encourage the offending party to alter the conduct in question. The mediator is not obligated to discontinue the mediation, but may do so if it appears necessary to avoid abuse of the process. When discontinuing a mediation under these circumstances, the mediator should not reveal the reasons for discontinuance if to do so would breach the mediator's obligation to maintain confidentiality of communications made within the mediation process.*

### **Standard 7: Competency.**

A mediator shall maintain professional competency in mediation skills and, where lacking the skills necessary for a particular case, shall decline to serve or shall withdraw from serving as a mediator. Installation ADR Champions are responsible for ensuring that collateral-duty mediators are provided sufficient training and mediation experience to meet this obligation.

#### *Comments:*

- *A mediator must meet the minimum qualifications set forth in paragraph 20.2 of this Instruction before mediating Air Force workplace disputes.*
- *The mediator should maintain and upgrade skills and substantive knowledge appropriate to his or her area of practice (e.g., a mediator must meet EEOC subject-matter knowledge criteria before mediating EEO complaints).*
- *The mediator should disclose to the parties the limits of his or her skills or substantive expertise whenever such limits may be pertinent to the mediator's handling of the case.*
- *Beyond disclosure, the mediator should exercise his or her own judgment in determining whether his or her skill level or substantive knowledge is sufficient to meet the demands of the case and, if not, should decline to serve or withdraw as the mediator.*